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*Attorneys for Defendants*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA  
AT ANCHORAGE**

BRISTOL BAY ECONOMIC  
DEVELOPMENT CORPORATION, *et al.*,

Plaintiffs,

v.

CHRIS HLADICK, U.S.  
ENVIRONMENTAL PROTECTION  
AGENCY, *et al.*,

Defendants.

CASE NO. 3:19-CV-00265-SLG

SALMONSTATE, *et al.*,

Plaintiffs,

CASE NO. 3:19-CV-00267-SLG

RESPONSE TO MOTION FOR ENTRY OF SCHEDULING  
ORDER - 1  
CASE NO. 3:19-CV-00265-SLG (CONSOLIDATED)

1 v.

2 CHRIS HLADICK, U.S.  
3 ENVIRONMENTAL PROTECTION  
4 AGENCY, *et al.*,

5 Defendants.

6 TROUT UNLIMITED,

7 Plaintiffs,

8 v.

9 U.S. ENVIRONMENTAL PROTECTION  
10 AGENCY, *et al.*,

11 Defendants.

CASE NO. 3:19-CV-00268-SLG

12  
13 **RESPONSE TO MOTION FOR ENTRY OF SCHEDULING ORDER**

14 Pursuant to the Court's Order Granting Motions to Consolidate, ECF 13, Defendants,  
15 Chris Hladick and the United States Environmental Protection Agency, provide this response  
16 to Plaintiffs' Scheduling Conference Report, and Motion for Entry of Scheduling Order  
17 "(Motion)", ECF 23. The Consolidation Order provided, *inter alia*, that "[c]ounsel for  
18 Plaintiffs . . . shall file a proposed scheduling order" by November 6, 2019, or, "[a]lternatively,  
19 the parties may file a notice that the provisions of Local Civil Rule 16.3 shall apply to this  
20 case."  
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1           A. Plaintiffs' Proposed Scheduling Order<sup>1</sup>

2           The Motion correctly acknowledged that Local Civil Rule 16.3 (“Administrative  
3 Agency Appeals”) applies to this matter, but included an exception “as may otherwise be  
4 specifically provided in the Court’s scheduling order(s).” Motion at 3. Plaintiffs asserted their  
5 view that this matter should be expedited so that the Court rules before the United States  
6 Army Corps of Engineers (“Corps”) makes a decision on the pending Clean Water Act  
7 Section 404 permit application for the proposed Pebble Mine. *Id.* at 4. Specifically, Plaintiffs  
8 asserted that they “currently expect a record of decision from the Corps in May 2020.” *Id.*; *see*  
9 Notice of Errata at 3. Defendants, however, are not in a position to state when the Corps will  
10 make a permit decision. Plaintiffs then proposed a scheduling order that differs from Local  
11 Civil Rule 16.3 in several important respects that would be prejudicial to Defendants.<sup>2</sup>

12           Perhaps most significantly, Plaintiffs’ proposal would contradict Local Civil Rule  
13 16.3(c)(1), which provides that a plaintiff’s opening brief must be filed “not later than 30 days  
14 following the filing of the agency record or 30 days after the court’s ruling on a motion to  
15 supplement the agency record, whichever is later.” Plaintiffs’ proposed scheduling order  
16 would require that Plaintiffs file their opening brief before any motion to supplement  
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21 <sup>1</sup> In the Motion, filed yesterday, Plaintiffs incorrectly asserted that “the Parties” – which  
22 would include Defendants – agreed or expected certain things. Motion at 4. Plaintiffs have  
23 filed a Notice of Errata to clarify that those assertions were made only on behalf of Plaintiff,  
ECF 24, and Defendants’ positions on those issues are explained further below.

24 <sup>2</sup> The Motion also included Plaintiffs’ characterizations of this case. Defendants, of course,  
25 do not necessarily agree with Plaintiffs’ characterizations and reserve all of their defenses to  
26 Plaintiffs’ claims and Plaintiffs’ characterizations of, *inter alia*, those claims, the underlying  
facts, and any relief to which Plaintiffs assert they are entitled.

1 (assuming that one is filed) is fully briefed, let alone decided. Motion at 5 (Plaintiffs' reply in  
2 support of a motion to supplement would be due on January 21, 2020, several days *after*  
3 Plaintiffs' opening merits brief is filed). This contradiction of the Local Civil Rules is  
4 especially problematic because it would mean that merits briefing would occur before the  
5 parties (or the Court) know whether particular documents are part of the agency record and,  
6 therefore, can be relied upon in the merits briefing. *Cf.* Local Civil Rule 16.3(b)(B) (requiring  
7 that the parties file an appendix containing copies of those portions of the agency record that  
8 are cited or otherwise relied upon by the parties in their merits briefs). By requiring that  
9 motions to supplement be decided *before* Plaintiffs file their merits briefs, the Local Civil Rules  
10 seek to avoid the confusion that would arise for the parties and the Court if the parties were  
11 to file merits brief before they know the scope of the agency record. That local framework  
12 makes good, practical sense, and should not be abandoned here.

15 In addition, Plaintiffs' proposed schedule unfairly would curtail the time that  
16 Defendants have to submit an opposition to a motion to supplement. *See* Motion at 5. Local  
17 Civil Rule 7.2 provides Defendants with 14 days to file that brief, but Plaintiffs' proposal  
18 would allow just seven days. Motion at 5 (requiring Defendants to file their opposition on  
19 January 14, after Plaintiffs would file their motion on January 7). Cutting short that timeframe  
20 obviously would be extremely prejudicial to Defendants. In addition, Plaintiffs' proposal  
21 selectively targets the time for Defendants to file their opposition brief without reducing the  
22 time for Plaintiffs to file their motion or their reply. *Id.* So while Plaintiffs want to expedite  
23 this potential briefing, their proposal only offers to do so by cutting short Defendants' allotted  
24 time for Plaintiffs to file their motion or their reply. *Id.* So while Plaintiffs want to expedite  
25 this potential briefing, their proposal only offers to do so by cutting short Defendants' allotted  
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1 time. Particularly under these circumstances, Plaintiffs' suggestion is obviously unfair and  
2 should be rejected.<sup>3</sup>

3 Plaintiffs' proposed schedule also would specify the time and the pages (or words) that  
4 any potential Intervenor-Defendants would be given in the merits briefing. No parties have  
5 sought to intervene. Accordingly, imposing limits on any such potential intervenors at this  
6 time would be premature and inappropriate.  
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#### 8 B. Defendants' Proposed Schedule

9 Defendants' position is that Local Civil Rule 16.3 should apply to this case, with only  
10 minor alterations to account for the fact that there are multiple sets of Plaintiffs in one  
11 consolidated matter. While Plaintiffs may want a prompt resolution of this matter, Plaintiffs  
12 have not established that the modifications they seek to Local Civil Rule 16.3 are needed here.  
13 A proposed schedule that would apply that Rule to this matter, with only such minor  
14 alterations, is attached hereto as Attachment A. Importantly, that schedule retains the  
15 framework specified in the Local Civil Rules under which a motion to supplement would be  
16 decided before Plaintiffs file their opening merits brief, and allots Defendants the 14 days to  
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20 <sup>3</sup> Furthermore, while Plaintiffs' proposal allows additional time for Defendants to submit  
21 their responses to the Complaints (including any motion to dismiss) and the agency record,  
22 Defendants do not need that additional time, and that additional time appears only to benefit  
23 Plaintiffs—so that Plaintiffs do not need to file a motion to supplement on New Year's Eve.  
24 Motion at 3 n.1; 5. While Defendants are willing to allow reasonable extensions of time to  
25 avoid the need for Plaintiffs to prepare briefs during holidays or other problematic times, it  
26 would be far more appropriate to retain the earlier submission dates for the responses to the  
Complaints and the agency record, as the Local Civil Rules specify, and also provide  
Defendants with the time that the Local Civil Rules allot for an opposition to a motion to  
supplement.

1 which they are entitled for submitting their opposition to a motion to supplement (assuming  
2 that such a motion is filed).

3 In addition, even if the Court were to accept Plaintiffs' view that a more expedited  
4 schedule is needed, adopting Plaintiffs' proposed schedule would be prejudicial to  
5 Defendants, including for the reasons discussed above. Accordingly, attached hereto as  
6 Attachment B is an alternative schedule that would accelerate the briefing of a motion to  
7 supplement (if any) and the merits in a manner that would be less problematic for Defendants  
8 than the schedule that Plaintiffs proposed. Notably, the framework for resolving a motion to  
9 supplement before Plaintiffs file their merits brief would be retained. In addition, to help  
10 speed the process of briefing a potential motion to supplement, Defendants would file an  
11 *index* to the agency record nearly three weeks before the agency record is due, so that Plaintiffs  
12 may determine sooner whether to file a motion to supplement and, if so, commence that  
13 briefing considerably earlier than Plaintiffs proposed in their schedule (and also avoid filing  
14 any briefs during the holidays).

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18 Respectfully submitted this 7<sup>th</sup> day of November, 2019.

19 /s/ Mark A. Nitczynski  
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21 United States Department of Justice - ENRD  
22 Environmental Defense Section  
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Attorneys for Defendants

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/s/ Mark A. Nitczynski



# ATTACHMENT A

<b>Document / Action</b>	<b>Proposed Deadline</b>	<b>Proposed Page/Word Limits</b>
Defendants' Responses to Complaints [including any Motions to Dismiss]	12/10/2019	N/A to Answers; 35/10,000 for any Motion to Dismiss
Agency Record	12/10/2019	N/A
Joint Motion to Supplement/Complete Record, if any	1/6/20 <sup>1</sup>	20/5,700
Plaintiffs' Joint Opposition to Motions to Dismiss, if any	1/6/20 <sup>2</sup>	35/10,000
Defendants' Opposition to Motion to Supplement the Record, if any	1/21/2020	20/5,700
Defendants' Reply in Support of Motion to Dismiss, if any	1/21/2020	20/5,700
Plaintiffs' Joint Reply in Support of Motion to Supplement, if any	1/28/2020	10/2,750
Plaintiffs' Joint Opening Merits Brief [and up to a total of three supplemental briefs (one brief in each of the three cases) filed by plaintiffs]	1/9/2020 or 21 days after the court's ruling on motion to supplement (if one is filed), whichever is later <sup>3</sup>	35/10,000 for a joint brief filed on behalf of all Plaintiffs 7/2000 for optional Supplemental Merits Briefs that may be filed by Plaintiffs in each of the three actions
Defendants' Opposition to Plaintiffs' Opening Merits Brief(s)	2/18/2020 or 40 days <sup>4</sup> after Plaintiffs' Opening	35/10,000, plus 7/2,000 additional for each Supplemental Merits Brief

<sup>1</sup> This date includes an extension of time so that Plaintiffs do not need to submit their brief during the holidays.

<sup>2</sup> This date also includes an extension of time so that Plaintiffs do not need to submit their brief during the holidays.

<sup>3</sup> The timeframe of 21 days after a ruling on a motion to supplement is included here to expedite this briefing even though the Local Civil Rules allow 30 days. Defendants respectfully submit that this timeframe should be adequate for Plaintiffs, especially because they are seeking to expedite the briefing and the due date would be many weeks after the agency record is submitted.

<sup>4</sup> Plaintiffs' proposed scheduling order also would allow 40 days for Defendants to file their merits brief, in recognition of the fact that Plaintiffs may file multiple merits briefs.

	Merits Brief, whichever is later	
Plaintiffs' Joint Reply Brief	14 days after Defendants' Opposition to Plaintiffs' Opening Merits Brief(s)	20/5,700 if no Supplemental Merits Briefs are filed; 25/6,875 if Supplemental Merits Briefs are filed
Request for Oral Argument, if any	7 days after Plaintiffs' Joint Reply Brief	N/A
Joint Appendix	14 days after Plaintiffs' Joint Reply Brief	N/A

# ATTACHMENT B

ATTACHMENT B TO RESPONSE TO MOTION FOR ENTRY OF SCHEDULING ORDER  
CASE NO. 3:19-CV-00265-SLG (CONSOLIDATED)

<b>Document / Action</b>	<b>Proposed Deadline</b>	<b>Proposed Page/Word Limits</b>
Defendants' Index to Agency Record	11/22/19	N/A
Joint Motion to Supplement/Complete Record, if any	12/6/19	20/5,700
Defendants' Responses to Complaints [including any Motions to Dismiss]	12/10/2019	N/A to Answers; 35/10,000 for any Motion to Dismiss
Agency Record	12/10/2019	N/A
Defendants' Opposition to Motion to Supplement the Record, if any	12/20/2020	20/5,700
Plaintiffs' Joint Opposition to Motions to Dismiss, if any	1/6/2020 <sup>1</sup>	35/10,000
Plaintiffs' Joint Reply in Support of Motion to Supplement, if any	1/6/2020 <sup>2</sup>	10/2,750
Defendants' Reply in Support of Motion to Dismiss, if any	1/21/2020	20/5,700
Plaintiffs' Joint Opening Merits Brief [and up to a total of three supplemental briefs (one brief in each of the three cases) filed by plaintiffs]	1/9/2020 or 21 days after the court's ruling on motion to supplement (if one is filed), whichever is later <sup>3</sup>	35/10,000 for a joint brief filed on behalf of all Plaintiffs 7/2000 for optional Supplemental Merits Briefs that may be filed by

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<sup>1</sup> This date includes an extension of time so that Plaintiffs do not need to submit their brief during the holidays.

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		Plaintiffs in each of the three actions
Defendants' Opposition to Plaintiffs' Opening Merits Brief(s)	2/18/2020 or 40 days <sup>4</sup> after Plaintiffs' Opening Merits Brief, whichever is later	35/10,000, plus 7/2,000 additional for each Supplemental Merits Brief
Plaintiffs' Joint Reply Brief	14 days after Defendants' Opposition to Plaintiffs' Opening Merits Brief(s)	20/5,700 if no Supplemental Merits Briefs are filed; 25/6,875 if Supplemental Merits Briefs are filed
Request for Oral Argument, if any	7 days after Plaintiffs' Joint Reply Brief	N/A
Joint Appendix	14 days after Plaintiffs' Joint Reply Brief	N/A

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<sup>4</sup> Plaintiffs' proposed scheduling order also would allow 40 days for Defendants to file their merits brief, in recognition of the fact that Plaintiffs may file multiple merits briefs.